



U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No. 197-31

477 Michigan Avenue
Detroit, Michigan 48226
January 31, 2005

The Honorable Clifford W. Taylor
Chief Justice
Michigan Supreme Court
Clerk's Office
P.O. Box 30052
Lansing, MI 48909

Re: Proposed Rules of Professional Conduct (ADM 2003-62)

Dear Chief Justice Taylor:

The purpose of this letter is to provide information regarding the impact of the Michigan Rules of Professional Conduct (the "Rules") upon the operations of the Federal Bureau of Investigation (FBI).

I am the Special Agent in Charge of the Detroit Division of the FBI and therefore have oversight of FBI operations for all of Michigan.

It has come to my attention that the Court is considering changes to the Rules, including Rule 4.2. That Rule proscribes lawyers from speaking with a represented party about the subject matter of the representation, and the comment to the Rule suggests that it applies to represented parties and represented persons (i.e., before formal charges have even been filed). Other Rules (5.3 and 8.4) provide that an attorney may not bypass his or her obligation under the Rules by employing or ratifying the conduct of another with whom he is associated. These Rules apply to attorneys in the United States Attorney's Office for both the Eastern and Western District of Michigan. In conducting investigations, FBI Special Agents assigned to the Detroit Division work very closely with prosecutors from both of these offices, and therefore questions often arise as to whether investigative actions taken by Special Agents might be imputed to attorneys from those offices.

Prosecutors from those offices are unable to assure themselves or the FBI that the Rules of Professional Conduct will not be applied to judge the conduct of Special Agents who seek advice from prosecutors; therefore, both the prosecutors and the

FBI Special Agents have to conduct themselves as if the ethical rules governing the conduct of lawyers also govern the conduct of FBI Agents. The application of these Rules, especially Rule 4.2, to law enforcement agents creates a significant tension between agents and prosecutors, and can create significant impediments to otherwise proper investigative actions.

Federal criminal investigations are frequently complex and fast-paced and can often involve a variety of investigative techniques, both overt and covert. Because all investigations necessarily present issues of constitutional and statutory law, as a matter of policy, FBI Special Agents are encouraged, and in some circumstances actually required, to obtain guidance or concurrence from an Assistant United States Attorney (AUSA) during an investigation. It is not unusual for a Special Agent to have frequent, sometimes daily, contact with an AUSA during the course of an investigation. Such contact helps ensure that investigations are conducted properly and with deference to individual rights. This provides a clear benefit to society, as well as to all individuals involved.

For example, the consensual monitoring technique is one investigative method for which AUSA concurrence is required. Consensual monitoring involves the surreptitious recording of a conversation where at least one of the parties consents. The consensual monitoring technique is extremely beneficial to the investigation and prosecution of federal criminal offenses as it can provide admissions from the subject himself. To ensure the monitoring is conducted legally, FBI policy requires that the Special Agent obtain prior concurrence from the appropriate AUSA. Where the individual to be intercepted is represented by counsel and the monitoring is otherwise legal, AUSAs have been hesitant to concur with the monitoring, for fear of running afoul of Rule 4.2 or its counterpart in other states. The result can be that the monitoring is not conducted or that the delay causes the opportunity to pass and valuable evidence is lost forever.

Another common circumstance in which Rule 4.2 arises involves instances where counsel is retained by the officers or management of a company under investigation, and counsel asserts that he represents all employees of the entity. If a Special Agent contacts an AUSA to discuss the possibility of talking to lower level employees of that company, which is otherwise completely legal and proper, the specter of Rule 4.2 can nonetheless preclude or impede that investigative action. Because the AUSA does not, and cannot, determine in advance whether their acquiescence in the interview by the Special Agent will later be deemed to have constituted a violation of Rule 4.2, AUSAs can be inclined to attempt to prohibit such interviews. This clearly provides a disincentive for a Special Agent to contact the AUSA for advice regarding these matters.

The upshot of these scenarios is that they show that rules related to actions by lawyers can lead to investigations being impeded with delays or with the loss of valuable evidence. They also illustrate that such rules can foster a relationship whereby Special Agents are disinclined to contact AUSAs for legal advice, potentially leading to inappropriate actions by the Special Agents. This obviously benefits no one.

The following are real-life examples which illustrate the difficulties that can be caused by Rule 4.2 or similar rules. All of these examples arose in FBI investigations, and some arose right here in Michigan:

1. An attorney for a federal grand jury witness advised that his client would be available to accept service of a grand jury subpoena at a certain date and time. When the Special Agent served the subpoena, the witness began to provide information relative to the investigation. The Special Agent advised the witness that he should not engage in any pertinent conversation without the consent of his attorney. The witness advised he wished to discuss the matter anyway and the Special Agent accepted the information. This is perfectly consistent with the training of the Special Agent, and with all applicable rules and constitutional protections governing law enforcement actions. However, when the Special Agent later advised the prosecutor on the case, the AUSA advised him to refuse to accept such information in the future.

2. During a health care fraud investigation, an attorney advised that the scope of his representation was limited to the owners, managers, and shareholders, of the corporation being investigated. An AUSA advised the investigating Special Agent that, unless lower level personnel of the company had representation independent of the first attorney, they still fell under the scope of that attorney's representation and they should not be interviewed.

3. In a bank fraud and embezzlement case, an indicted individual telephonically contacted the investigating Special Agent with information related to the indictment and information about a separate criminal offense. Upon advising the AUSA of this, the Special Agent was told to refuse the information regarding the separate criminal offense.

4. In a health care fraud case, a search warrant was executed at the office of a doctor who was the subject of the investigation. After a Special Agent interviewed one of the employees in that office, he was advised by the doctor's attorney that the attorney also represented all of the office's employees and that all interviews should cease. An AUSA thereafter advised the Special Agent that, despite the clear conflict of interest,

the attorney in fact represented all employees, that there should be no more interviews, and that the initial interview violated ethical rules. The AUSA further advised the Special Agent that the evidence seized should not be used because it was tainted by the unethical interview and that the AUSA may have to recuse himself from the matter. In that same case, the FBI had a confidential source, who was a former employee of the doctor and who continued to receive payments from the doctor. Although this was information significant to the investigation, the FBI Agent chose not to inform the AUSA of this for fear that the AUSA would prohibit contact with the confidential source.

5. A subject in a mortgage fraud matter retained counsel to represent him in regulatory and criminal investigations pending against him with regard to the fraud. The subject had not been indicted. The FBI then learned that the subject directed one of the few remaining employees of his company to deliver records and documentation to him to be destroyed. The FBI wanted to approach the employee and try to convince him to elicit and record incriminating statements from the subject related to the destruction of evidence. The assigned AUSA would not authorize using the cooperating employee to communicate with the subject, again on the grounds that it would violate the state's represented party rule.

6. A mortgage broker submitted false mortgage applications to a number of financial institutions. The financial institutions agreed to cooperate with the FBI and record conversations with the subject when he next visited these institutions to commit fraud. The subject became aware that law enforcement was investigating his mortgage applications and he retained counsel. The United States Attorney's Office refused to concur in the consensual recording of the subject due to his retention of counsel.

7. The FBI wished to interview two subjects in a securities fraud investigation. The two had previously been interviewed as witnesses in an unrelated securities fraud investigation conducted by a different FBI field office. The two were not subjects of the other investigation; but they were interviewed because they traded in the stock being investigated. Both were interviewed with their attorneys present. When the Special Agent suggested that the two be consensually recorded, the AUSA advised that because the two were represented, consensual recordings or attempts to interview them directly were prohibited. The AUSA's position was that any contact with the two would have to be made through their attorneys.

8. A subject was investigated for art thefts and bankruptcy fraud. The subject had filed for bankruptcy and was represented in the bankruptcy action by an attorney. An AUSA

refused to authorize consensually recorded conversations between the subject and an artist, whose paintings had been stolen by the subject, because she was represented by counsel. The subject then died. If the recordings had been made, probable cause would have been established to execute a search warrant at her residence. This may have resulted in charges of art theft, bank fraud and bankruptcy fraud. After her death, the Special Agent went to the residence and located \$40,000 worth of artwork belonging to various artists who had never been paid. The artwork became part of the subject's estate and was never returned to the artists.

9. During a mortgage fraud investigation, a subject became willing to cooperate and was in a position to contact other subjects regarding fraudulent mortgage practices. A main subject was supposedly represented in a prior civil case, but was not represented in the criminal investigation relative to the mortgage practices. The AUSA, however, would not authorize any consensual monitoring due to the prior representation.

10. During the investigation of a large investment fraud scheme, one or more of the victims who suffered a loss brought a civil suit against the subjects. The AUSA refused to authorize the consensual recording of conversations between the subjects and a victim who had not filed a lawsuit. The subjects continued to defraud investors of large sums of money.

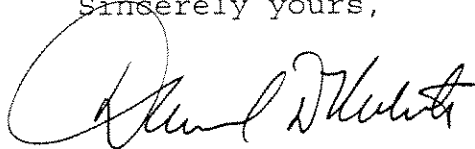
11. One of the primary subjects in an undercover operation into stock market fraud had been previously indicted in another stock market fraud investigation. He later sought the help of an FBI confidential source to set up a fraudulent off-shore account. The Special Agent sought to have the source consensually record criminal conversations with the subject in another state. The AUSA in the original state would not permit the meeting to take place because of concern for the represented party rule in the second state.

12. A confidential source in a bribe investigation was approached by the subject's attorney. The subject had either legitimately lobbied or illegally bribed state legislators to permit the source to gain a business advantage, and the attorney was seeking payment for the subject in return for his services to the source. It presented an opportunity for the source to get a recording with the subject, but because he was represented by an attorney, the AUSA would not permit it even though the representation was not directly related to the criminal investigation. The AUSA asked the Department of Justice (DOJ) for an opinion, but the opportunity to obtain the evidence was lost before the DOJ ethical advisors were able to weigh in on the matter.

The above examples illustrate the tension that exists between Special Agents who are attempting to conduct lawful investigations and AUSAs who are subject to attorney ethical rules and potentially responsible for the actions of those Special Agents. It must be emphasized that, in each of these examples, absent the potential imputation of responsibility to the prosecutor (and hence the importation of the rules governing attorney conduct), the proposed actions of the FBI Agents were entirely permissible and appropriate. As can be seen, the resulting tension unnecessarily impedes investigations and produces a climate whereby Special Agents are disinclined to seek out legal advice.

If I be of further assistance in this matter, please feel free to contact me at telephone number (313) 237-4007.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Daniel D. Roberts", written in a cursive style.

Daniel D. Roberts
Special Agent in Charge